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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 314

NICK J. CHRISTIANA,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Nick J. Christiana, by his attorneys, petitions for a writ of certiorari to review a judgment of the Supreme Court of Louisiana affirming petitioner's conviction for being an accessory after the fact to robbery and receiving stolen money.

OPINIONS BELOW

The opinion of the Supreme Court of Louisiana dated May 2, 1966, is unreported and is set forth in Appendix A hereto (R. 471). A petition for rhearing was denied on June 6, 1966 (R. 492). The relevant per curiam rulings of the Criminal District Court for the Parish of Orleans dated December 17, 1965, are set forth in Appendix B (R. 72-77, 103-104, 107-108).

JURISDICTION

The decision of the Court below was filed May 2, 1966. On June 6, 1966, a petition for rehearing was denied. The jurisdiction of this Court is conferred by 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Whether the arrest without a warrant and search of petitioner's person were lawful and constitutional where the police invaded petitioner's private office and opened the door of such office without announcement of purpose or refusal of admittance contrary to Article 72 of the Louisiana Criminal Code. Whether the statutory requirement of announcement of purpose and refusal of admittance are to be waived in the absence of evidence that police officers failed to comply because they feared for their lives or feared the destruction of evidence.

2. Whether probable cause for an arrest without a warrant existed for arrest for accessory after the fact to robbery where police officers saw petitioner with a bundle of uncounted and unidentified money in his hand in his private office with a robbery suspect for whom petitioner acted as bondsman.

3. Whether a search warrant issued after petitioner's arrest and based upon an application which merely stated that the police officer "has good reason to believe that further evidence of the crime of 14:25 is at the premises" was valid.

4. Whether convictions and separate consecutive sentences for accessory after the fact to robbery and receiving money stolen in such robbery subject petitioner to double punishment contrary to the Constitutions of Louisiana and the United States.

5. Whether the statutory crime of receiving stolen goods in Louisiana based alternatively upon negligence or criminal intent and the trial court's charge under such

statute that possession of property recently stolen is evidence of such crime are constitutionally valid.

6. Whether petitioner, a bondsman in criminal cases, was denied a fair trial and due process by reason of the prejudicial summation of prosecuting attorneys accusing him of maneuvering criminals on the street like checkers and compelling desperate and destitute people to steal.

7. Whether the denial of bail to petitioner pending appeal solely upon the basis that he has been sentenced for five years on one count herein and without regard to his availability or his lack of danger to the community, violates his constitutional right to due process and equal protection of law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution provides, in part:

> "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *."

The Fourteenth Amendment to the United States Constitution provides, in part:

> "No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

Article 1, Section 7, of the Louisiana State Constitution provides, in part:

> "* * * no * * * search or seizure shall be made except upon warrant therefor issued upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Article 1, Section 9, of the Louisiana State Constitution provides, in part, that persons shall not:

> "be twice put in jeopardy of life and liberty for the same offense * * *."

Section 14:25 of the Revised Statutes of Louisiana provides:

> "*Accessory after the fact.* An accessory after the fact is any person who, after the commission of a felony, shall harbor, conceal, or aid the offender, knowing or having reasonable ground to believe that he has committed the felony, and with intent that he may avoid or escape from arrest, trial, conviction or punishment."

Section 14:69 of the Revised Statutes of Louisiana provides:

> "*Receiving Stolen things.* Receiving stolen things is the intentional procuring, receiving, or concealing of anything of value which has been the subject of any robbery or theft, under circumstances which indicate that the offender knew or had good reason to believe that the thing was the subject of one of these offenses."

Section 15:85 of the Revised Statutes of Louisiana provides:

> "*Persons not bailable.* No person charged with a capital offense shall be admitted to bail if the proof of his guilt is evident, or the presumption is great, or after conviction of a felony; provided that where a sentence of less than five years at hard labor is actually imposed, bail shall be allowed pending appeal and until final judgment."

Section 15:217 of the Revised Statutes of Louisiana provides:

> "*Charge of crime: Restrictions.* Except as otherwise provided under this title, no indictment shall charge more than one crime, but the same crime may be charged in different ways in several counts."

Section 15:381 of the Revised Statutes of Louisiana provides:

> "*Scope - Law and Evidence - Prejudice.* Counsel may argue to the jury both the law and the evidence of the case, but must confine themselves to matters as to which evidence has been received, or of which judicial cognizance is taken, and to the law applicable to the evidence; and counsel shall refrain from any appeal to prejudice."

Section 15:550 of the Revised Statutes of Louisiana provides:

> "*Bail pending appeal in felony cases.* No person convicted of a felony shall be discharged on bail pending his appeal; provided that when a sentence of less than five years at hard labor is actually imposed, bail shall be allowed pending appeal and until final judgment."

Section 15:566 of the Revised Statutes of Louisiana provides:

> "*Delivery of convict to penitentiary.* The sheriff, within fifteen days of the date upon which any sentence to imprisonment at hard labor shall become final, shall, unless the Governor shall have reprieved said convict, deliver the convict to the warden of the state penitentiary at Baton Rouge."

STATEMENT OF THE CASE

Petitioner was charged and convicted for unlawfully (R. 11-17) becoming an accessory after the fact to armed robbery by one Thomas Williams in that he did harbor, conceal and aid Williams contrary to the Revised Statutes of Louisiana 14:25 (Count One) and for receiving stolen money taken in such robbery in the sum of $655.00 contrary to Revised Statutes 14:69 (Count Two). The latter section authorizes a conviction if a person had good reason to believe that the received goods were stolen.

Petitioner, a bondsman, was arrested on September 1, 1965, without a warrant in his private business office by police officer Flint. The latter, together with two other members of the police force, entered the bail bonding offices of petitioner without an arrest or search warrant, seeking Thomas Williams who had committed armed robbery a half-hour previously. After entering the reception room, Officer Flint, armed with a shotgun, proceeded to the private office of petitioner and opened the closed door of such office without knocking or announcing his purpose. There he found Williams and petitioner. Williams was first placed under arrest and searched. Several .38 caliber shells were seized from his person and a .38 caliber gun was seized from the drawer of petitioner's desk at which Williams was seated. Williams made no statement at that time implicating petitioner, but petitioner was seen placing a bundle of money in his left pocket. He was arrested as an accessory after the fact and all the money in his left and right pockets were seized.

Later on September 1, 1965, the same day, a search warrant was sought by Officer Flint alleging that he had "good reason to believe that further evidence of the crime of 14:25 is at the premises". With this search warrant (State Ex. 13, R. 205-210) records pertaining to a bond posted by petitioner for Williams on August 29, 1965, and other records were seized and later introduced in evidence.

A pretrial motion to suppress (R. 21) the evidence seized at the time of arrest and subsequent thereto was denied upon the ground that the police had no time to secure a warrant of arrest (R. 204). Thereafter, the Criminal District Court asserted (R. 75-76):

> "What the officers saw Nick Christiana doing as they entered the office is what caused them to arrest Christiana.
>
> * * *
>
> "To require Officer Flint to stop at his door and an-

nounce his purpose would amount to subjecting him to a hazard beyond even that required by his profession.

"Evidence could have been destroyed or secreted (such an attempt was made by Christiana) while the officer waited for a refusal of admittance.

"The officer or the defendant's life could have been placed in jeopardy by a delay at the door."

The Supreme Court of Louisiana approved the foregoing basis for excusing the announcement of purpose and refusal of admittance required by Article 72 of the Louisiana Criminal Code (Appendix A). Reliance was placed below upon *Ker v. California*, 374 U.S. 23 (1963). However, unlike *Ker v. California*, no testimony was ever adduced herein that the police feared destruction of evidence, danger to their lives or the life of petitioner if they complied with the statute. Police Officer Flint testified merely that he did not call out Williams' name because of fear that he might endanger himself (R. 188). He was never questioned as to why he failed to announce his purpose or knock on petitioner's door.

Petitioner's conviction for recieving stolen money was based upon a statute and charge to the jury which permitted a finding of guilt based upon negligence and recent possession (R. 460-462). He was convicted on November 24, 1965, of accessory after the fact to robbery and receiving money stolen in such robbery and sentenced on December 13, 1965 to consecutive terms of five years and three years at hard labor in the penitentiary for each count. In their summation, the prosecuting attorneys appealed to the emotions of the jury alleging that society would be better off with petitioner in jail, that petitioner maneuvered criminals on the street like checkers and that he compelled desperate and destitute people to rob (R. 89-90). None of these allegations were true or based upon matters of record.

By reason of the five year sentence at hard labor on the accessory charge, petitioner has been denied bail

pending appeal, although no claim can be made that his presence at large would endanger society or that he would abscond. Had he been sentenced on this charge to one day less, bail would have been required and granted. Petitioner has a medical history of two heart attacks, hypertension and diabetes. He has been in the Parish jail since his conviction on November 24, 1965. Under Louisiana law this period of detention is not counted in computing the time served (Revised Statutes 15:566). Had he not filed an appeal, he would have been delivered to the penitentiary to begin serving his sentence immediately after conviction.

REASONS FOR GRANTING THE WRIT

1. *Ker v. California*, 374 U.S. 23 (1963), has been the subject of divergent views. Some courts find the case "particularly difficult to interpret because there was no opinion of the Court in which the five justices concurred in its entirety" *United States v. Sims*, 231 F. Supp. 251 (D.C. Md. 1964). The courts below, following the *Ker* case (R. 75-76, 477), expand its doctrine and hold that even in the absence of evidence establishing likelihood of destruction of evidence or danger to life, the statutory requirement of announcement of purpose and refusal of admittance may be excused before breaking and entering the privacy of one's office. Contrary to the decision below, decisions interpreting the identically worded federal statute, 18 U.S.C. 3109, have held that reasonable belief of increased bodily harm to an arresting officer does not excuse announcement of purpose. *United States v. Sims*, 231 F. Supp. 251 (D.C. Md. 1964); *Gaitlin v. United States*, 326 F.2d 666 (D.C. Cir. 1963); *Hair v. United States*, 289 F.2d 894 (D.C. Cir. 1961).

The announcement requirement of the statute here under consideration is not only identical with 18 U.S.C. 3109, but similar to those enacted in twenty-six states. *Miller v. United States*, 357 U.S. 301, 308, note 8 (1958). The requirement was pronounced in 1603 in *Semayne's Case*, 5 Co. Rep. 91a, 77 Eng. Repr. 194, 195, and is one basic to

our jurisprudence. Whether it is to be eroded in the absence of evidence establishing exigent circumstances, whether persons may be deprived of its statutory benefits in the absence of proof justifying dispensation of the statute, is an important statutory question affecting the criminal jurisprudence of Louisiana, the federal courts and of many states. Whether *Ker v. California*, is to be expanded to justify the decision below is a constitutional problem justifying intervention by this Court.

2. The finding of the trial court is clear that petitioner was arrested as an accessory after the fact because of what the police officer saw upon entry into his private office (R. 75-76). Upon entry the police officer merely saw petitioner, a bondsman, with a bundle of uncounted, unidentified money and a robbery suspect who had been bonded by petitioner seated in the office. This furnished no basis for a prudent man to conclude that petitioner was guilty as an accessory after the fact - that he was sheltering or aiding a felon to escape arrest, trial or punishment. The decisions below are contrary to *Henry v. United States*, 361 U.S. 98 (1959), and *Beck v. Ohio*, 379 U.S. 89 (1964). What the police officer saw upon entry would not have justified a magistrate in issuing a warrant of arrest for the crime of accessory after the fact.

3. A search warrant was issued herein (State Ex. 13, R. 205-210) upon an application stating that the police officer:

> "has good reason to believe that further evidence of the crime of 14:25 (accessory after the fact) is at the premises."

Evidence seized under this warrant was utilized at the trial below (State Ex. 9-12).

Probable cause is required by the United States Constitution and by the Louisiana State Constitution for the issuance of a search warrant. The conclusory affidavit of the police officer did not furnish probable cause and the evidence seized pursuant to the search warrant (State Ex. 9-

12) should have been suppressed. The decisions below sustaining the search and seizure are contrary to *United States v. Ventresca*, 380 U.S. 102 (1965); *Anguilar v. Texas*, 378 U.S. 108 (1964), and *McIlvaine v. Louisiana*, 379 U.S. 10 (1964).

The failure to observe the constitutional requirement of probable cause herein and the proper administration of criminal justice in state courts justify intervention herein by the Supreme Court.

4. Under Louisiana law no indictment or information may charge more than one crime but the same crime may be charged in different ways (Revised Statutes 15:217). Petitioner was sentenced to consecutive terms at hard labor under an information charging him with being an accessory after the fact to robbery and receiving money stolen in such robbery. Federal and state cases recognize that the legislatures have refused to punish for theft and unlawfully receiving the same property. *Milanovich v. United States*, 365 U.S. 551 (1961); *State v. Ugarte*, 176 La. 54, 145 So. 266 (1933). Here, petitioner is being subjected to double punishment in a similar situation - for being an accessory to robbery of money and for receiving the same stolen money. If he be guilty of a crime, petitioner has offended society in only one way - by his contact with the felon after the robbery. See *United States v. Goldman*, 352 F.2d 263 (3rd Cir. 1965). Under Louisiana law the test of identity of offenses is not technical but substantial identity. *State v. Roberts*, 152 La. 283, 93 So. 95 (1922). Considering the fact that petitioner could only be charged in one information of the same crime in different ways, it is clear that substantial identity of offense was presented. Petitioner is being illegally subjected to double punishment for the same offense. Both counts of the information were improperly submitted to the jury, contrary to *Milanovich v. United States*, 365 U.S. 551 (1961), and contrary to the Fifth Amendment and the Louisiana State Constitution.

5. The Louisiana statute (Revised Statutes 14:69) authorizes a conviction for receiving stolen things "under circumstances which indicate that the offender knew or had good reason to believe that the thing" was stolen. Under this statute criminal liability is fixed by requiring a petitioner with a third grade education to measure to the standard of mentality of some imaginary man of ordinary intelligence. Stupidity or negligence may determine whether a person is guilty of the commission of a felony. *Schaffer v. United States*, 221 F.2d 17 (5th Cir. 1955); *Kasle v. United States*, 233 Fed. 878 (6th Cir. 1916). By eliminating criminal intent from the crime of receiving, the Louisiana legislature violated the due process clause of the Fourteenth Amendment. *Smith v. California*, 361 U.S. 147 (1959); *Lambert v. California*, 355 U.S. 225 (1957); *Schaffer v. United States, supra, Kasle v. United States, supra.* The Court charged the jury that it might presume guilt from the mere recent possession of stolen money (R. 460-462). This was held improper in *Kasle v. United States, supra.* Whether the Louisiana statute defining the crime of receiving stolen things and the Court's charge to the jury meet constitutional standards of due process are issues deserving of review.

6. Although provisions of the Louisiana Criminal Code specifically prohibit appeals to prejudice in summations to the jury (Revised Statutes 15:381), in this case the prosecutors told the jury that society would be better off with petitioner in jail, that he maneuvered criminals on the street like checkers, and that he was a greedy old man compelling desperate and destitute people to rob and steal. (R. 89-90). No evidence was adduced to prove these claims. Moreover, they were not only untrue but were also highly inflammatory. The duty of the prosecution is not that it shall win a case but that justice shall be done. *Berger v. United States*, 295 U.S. 78, 88 (1934); *Jencks v. United States*, 353 U.S. 668, 671 (1956). Prejudicial remarks in argument to a jury are especially harmful when made by a representative of the government - the Dis-

trict Attorney. *United States v. Spangelet*, 258 F.2d 338, 342 (2nd Cir. 1958). Although no objections were made to the remarks of the prosecutors at the trial, the issue was raised in a motion for a new trial (R. 30-32). A prejudicial summation may be considered of such a serious nature as to warrant a new trial even in the absence of exceptions. *State v. Henry*, 196 La. 218, 198 So. 910 (1940); *State v. Smith*, 196 La. 652, 199 So. 791 (1941). Here, the summation clearly departed from the bounds of propriety and deprived petitioner of a fair trial. He should not be required to spend eight years at hard labor on this record.

7. Petitioner has been denied bail pending appeal upon the basis of his sentence for five years at hard labor under Count One of the information. Petitioner asserted and submitted medical evidence to show that he has had two heart attacks, hypertension and diabetes (R. 28). No claim is made that he will abscond or that he will endanger society if released on bail. Under Louisiana law, however, those who appeal convictions on non-bailable offenses are penalized. They remain in jail and their period of detention is not counted in computing their time served. Revised Statutes 15:566. Those who do not appeal are delivered to the penitentiary and begin serving their sentence immediately. Petitioner has been in the Parish jail since November 24, 1965. Had he been sentenced to one day less on Count One he would have been entitled to bail as a matter of right.

The effect of Louisiana law is to create a conclusive presumption that a person sentenced to four years and eleven months is a bailable risk but one sentenced to five years is not, regardless of the crime or the individual's health and background. This presumption violates due process. *Manely v. Georgia*, 279 U.S. 1 (1928); *Schlesinger v. Wisconsin*, 270 U.S. 230 (1925); *Heiner v. Donovan*, 285 U.S. 312 (1931); *Adler v. Board of Education*, 342 U.S. 485 (1952). This important issue relating to criminal justice in Louisiana should be reviewed.

CONCLUSION

Certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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